Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DISCUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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Appellant, Paul J. Wengler, appeals from the final order of the Missouri Supreme Court entered July 17, 1979, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented. U.S. Supreme Court Rule 15, 28 U.S.C.A. §1257(2).

OPINIONS BELOW

The opinion of the Missouri Supreme Court entered June 27, 1979, motion for rehearing overruled July 17, 1979, and the opinion of the Circuit Court of Madison County, Missouri, are set out in the Appendix hereto. The decision of the Missouri Supreme Court is reported as *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W. 2d 162 (Mo., 1979).

JURISDICTION

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming her to be totally dependent upon her husband's wages for her support.

The federal constitutional question was timely raised by appellant before the case was submitted to the Administrative Law Judge and has continuously been raised on appeal. On October 13, 1977, the Circuit Court of Madison County, Missouri, held for appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions required death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident. On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal Constitution. The dissenting opinion of Justice Seiler

states the majority failed to follow the recent U.S. Supreme Court cases deciding gender-based discrimination.

A timely motion for rehearing, filed by appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was timely filed on July 19, 1979.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Stanton v. Stanton*, 421 U.S. 7 (1975); *Duren v. Missouri*, 99 S.Ct. 664 (1979); *Orr v. Orr*, 99 S.Ct. 1102 (1979).

STATUTE INVOLVED

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Appendix hereto. In relevant part, the statute provides:

. . .

> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . .
>
> (4) The word *"dependent"* as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:
>
> (a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . .

QUESTION PRESENTED

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the Constitution.

STATEMENT OF THE CASE

Ruth Wengler, wife of appellant Paul J. Wengler, was killed in an accident while working for Appellee, Discus Prescription Drugs, Inc. Appellant Paul J. Wengler made a claim for Workers' Compensation Death Benefits under 1976 Revised Statutes of Missouri Section 287.240. Prior to the July 21, 1977 hearing before the referee, widower Paul J. Wengler filed a memorandum of law setting forth that Section 287.240 violated the equal protection clause of the Federal Constitution; at the hearing, the referee noted that the constitutionality of Section 287.-240 was at issue.

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning.

On August 4, 1977, the referee denied benefits to appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency. On review, the Missouri Labor and Industrial Relations Commission, September 9, 1977, adopted the referee's award and denied compensation. On October 13, 1977, the Circuit Court of Madison County, Missouri, reversed. The Circuit Court of Madison County, Missouri, held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute conclusively presumes the total dependency of a widow upon a husband who dies in a work-related accident, but denies that same presumption to a widower whose wife dies in a work-related accident.

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex.

The Missouri Supreme Court majority acknowledged this Court's condemnation in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Califano v. Goldfarb*, 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," statutes "casting female wage earners in a light which denigrates their economic contributions to their families' support." It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied *Wiesenfeld* and *Goldfarb* to invalidate proof-of-dependency requirements imposed on widowers, but not widows, under workers' compensation statutes. *Tomarchio v. Township of Greenwich*, 75 N.J. 62, 379 A.2d 848 (1977); *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal.3d 395, 563 P.2d 849 (1977); *Passante v. Walden Printing Co.*, 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). But it disposed of the judgments of this Court and others as "[i]n most instances" arriving at "self-serving conclusions."

THE FEDERAL QUESTION IS SUBSTANTIAL

Ruth Wengler was killed in a work-related accident. Because she was female, her surviving spouse, appellant Paul J. Wengler, does not qualify under Missouri law for workers' compensation death benefits. Were the sex of the spouses in this case reversed, it is undisputed that death benefits would be due.

The Missouri law in question conclusively presumes every female spouse "dependent." Every male spouse, the Missouri law labels nondependent absent proof of his incapacity to work, or his actual economic dependence on his wife's earnings. This gender classification is familiar. It is indistinguishable on any principled ground from the ones this Court has invalidated in a solid line of decision from *Frontiero v. Richardson*, 411 U.S. 677 (1973), to *Califano v. Westcott*, 99 S.Ct. 2655 (1979). As dissenting Judge Seiler in the Missouri Supreme Court succinctly stated, this Court's precedent instructs unambiguously that neither "administrative convenience" nor "overbroad characterization of the male as the primary breadwinner" can "serve to counterbalance or justify 'a gender-based distinction which diminishes the protection afforded to women who do work.'" (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975))

Applying the equal protection principle as elaborated in this Court's 1970s gender classification precedent, three state courts have recently invalidated proof-of-dependency requirements state workers' compensation laws imposed on widowers but not widows. *Tomarchio v. Township of Greenwich*, 75 N.J. 62, 379 A.2d 843 (1977); *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal.3d 395, 563 P.2d 849 (1977); *Passante v. Walden Printing Co.*, 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976). Only Missouri continues to march to a different tune. Cf. *Duren v. Missouri*, 99 S.Ct. 664 (1979). No other jurisdiction, in the wake of *Frontiero* and *Wiesenfeld, supra*, and *Califano v. Goldfarb*, 430 U.S. 199 (1977), has aligned itself with the majority

below. See Note, 9 U. Mich, J. L. Ref. 138 (1975) (workers' compensation laws in most states extend conclusive presumption of dependency to widower and widow alike).

The Missouri Supreme Court purported to distinguish "the social security cases" (*Wiesenfeld* and *Goldfarb*) on the ground that the benefits to surviving spouses there at issue were "social insurance," "based upon mandatory contributions from past wage earnings of the employee." That distinction, wispy in any event, could hardly be approved on the date of the decision below, June 27, 1979, and surely not on July 17, 1979, when rehearing was denied. Because on June 25, 1979, this Court, in *Califano v. Wescott, supra,* unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. Those benefits were not tied to any "contributions from past wage earnings of the employee."

Westcott reiterated a point made consistently in *Frontiero, Wiesenfeld* and *Goldfarb*, and earlier last Term in *Orr v. Orr*, 99 S.Ct. 1102 (1979): Explicit sex classification statutes must fall which reflect the "baggage of sexual stereotypes," which presume that men have "primary responsibility to provide a home and its essentials," and women are the "center of the home and family life." *Califano v. Westcott*, 99 S.Ct. 2655 at 2663.

In summary, the majority of the Missouri Supreme Court is impossible to justify on any reasoned basis, and merits swift, summary reversal by this Court. Cf. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975) (summarily reversing Utah Supreme Court decision for inconsistency with this Court's clear fourteenth amendment ruling).

CONCLUSION

The decision below upholding the statutory gender-based classification should be summarily reversed and sent back to the Missouri Supreme Court for a decision on whether the remedy should be to invalidate the entire provision of the Missouri Statute on workmen's compensation death benefits to surviving spouses or to extend the coverage to include both the widowers and widows under the Missouri statute on workmen's compensation death benefits. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975). Alternately, this appeal should be accorded plenary review.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of Missouri
en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company, and Dicus Prescription Drugs, Inc.,
Appellants.
No. 60,442.

Appeal from the Circuit Court of Madison County
Honorable Stanley J. Murphy, Judge

(Filed June 27, 1979)

The issue on this appeal is whether the provision contained in section 287.240, RSMo Supp. 1976, which affords a conclusive presumption of dependency to a widow for obtaining workmen's compensation benefits for the death of her spouse but requires a widower to prove actual dependency to receive reciprocal benefits, offends the equal protection clause of art. 1, sec. 2, Mo. Const., and amendment 14, U.S.Const.

Plaintiff-respondent Paul J. Wengler's wife Ruth was killed in an accident while working for defendant-appellant Dicus Prescription Drugs, Inc., and plaintiff made a claim for workmen's compensation death benefits under sec. 287.240(2). It is stipulated that plaintiff was not actually dependent for support, in whole or in part, upon the wages of his wife at the time of the injury, nor was he mentally or physically impaired from wage earning. In order for a widower to obtain periodic death benefits under 287.240(4) and (4)(a) upon the work-related

death of his wife, the widower must either be (1) mentally or physically incapacitated from wage earning, or (2) must prove actual dependency for support, in whole or in part, upon his wife's wages. However, if the husband dies in a work-related accident, the surviving widow is conclusively presumed to be totally dependent upon her husband's wages for support. She does not need to prove actual dependency. Sec. 287.240(4) and (4)(a).[1] A child under age 18 is also conclusively presumed to be totally dependent upon his parent under 287.240(4)(b).

The workmen's compensation referee denied plaintiff benefits because no dependency on his wife's wages was shown. On review, the Labor and Industrial Relations Commission adopted the referee's award and denied compensation. The circuit court reversed and held that because sec. 287.240 affords a conclusive presumption of total dependency to a widow upon her husband's work-related death, it constitutes a denial of equal protection under art. 1, sec. 2, Mo.Const., and the fourteenth amendment, U.S.Const., to require a widower to prove dependency and to deny that same presumption to a husband whose wife dies in a work-related accident.

---

[1] "(4) The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter;".

The employer and insurer appealed. This court has jurisdiction. Art. 5, sec. 3, Mo.Const. Our decision upholding the constitutionality of sec. 287.240(4) and (4)(a) renders other issues on the cross-appeal moot.

The workmen's compensation act is considered substitutional for common-law tort remedies. Sheet v. Hill Bros. Distributors, Inc., 379 S.W.2d 514 (Mo. 1964). Its primary purpose is to ameliorate, in the interest of working people and the public welfare, losses sustained from accidental injuries received by the working person in the course of employment, Reed v. Kansas City Wholesale Grocery Co., 156 S.W.2d 747 (Mo.App. 1941), and is to be liberally construed with a view to the public welfare. Sec. 287.800, RSMo 1969.

The act was first adopted by the legislature in 1925 (Laws of Mo. 1925, p. 375), and upon being referred to a vote of the people it was approved at the November 1926 election (Laws of Mo. 1927, p. 490).

Section 21 of the original act provided for compensation upon the death of an employee. The definition of "dependent" in sec. 21(d) has continued to the present unchanged and is now sec. 287.240. The conclusive presumption of dependency of "a wife upon a husband legally liable for her support" was part of the original act, as was the provision which results in a nondisabled husband being required to show actual dependency, in whole or in part, to receive compensation upon the work-related death of his wife.

Workmen's compensation is not, in the main, financed by taxes and the payment of compensation is not a governmental obligation but rather the obligation of the employer.

The plaintiff contends that because of the differential in treatment of husbands and wives in claims under sec 287.240 is

gender based, it violates the equal protection clause of art. 1, sec. 2, Mo.Const., and the fourteenth amendment, U.S.Const.

To withstand scrutiny under the equal protection clause, classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Califano v. Webster, 430 U.S. 313, 316-317 (1977).

In Kahn v. Shevin, 416 U.S. 351 (1974), the court upheld the constitutionality of a Florida statute which, since 1885, granted all widows an annual $500 tax exemption as against an equal protection attack brought by a widower. The court said there could "be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." Earning statistics, cited in *Kahn*, of men as compared with women from 1955 to 1972 showed in 1972 that a woman working full time had a median income which was only 57.9% of the median for men—six points lower than in 1955. The court observed at 354, "While a widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." It was also noted at 355, footnote 7: "It is still the case that in the majority of families where both spouses are present, the woman is not employed. A. Ferriss, Indicators of Trends in the Status of American Women 95 (1971)."

Kahn v. Shevin, *supra*, distinguished Frontiero v. Richardson, 411 U.S. 677 (1973), on the basis that the denial to service women of procedural and substantive benefits granted service men was **"solely"** for administrative convenience and served no important governmental objective; whereas, in Kahn, widows

were found to be at an economic disadvantage to widowers. The court thereupon held that the Florida statute rested upon a ground of difference that had a fair and substantial relation to be the object of the legislation.

Likewise, in Califano v. Webster, 430 U.S. 313 (1977), the court upheld a gender-based difference which benefited women by requiring fewer number of elapsed years to qualify for certain old-age insurance benefits for women than for men. This, the court held, was a justifiable difference to correct a long history of discrimination against women by a male-dominated culture and an inhospitable job market.

However, in Califano v. Goldfarb, 430 U.S. 199 (1977), the court held a gender-based distinction created by a provision of the social security act violated the due process clause of the Fifth Amendment. The provision in question allowed a widow to receive benefits based upon the earnings of her deceased husband without showing actual dependency but required a widower to prove he was receiving at least one-half of his support from his deceased wife to qualify for benefits upon his working wife's death. The court, following Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), said at 206-207:

> ". . . *Wiesenfeld* thus inescapably compels the conclusion reached by the District Court that the gender-based differentiation created by sec. 402(f)(1)(D)—that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men—is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, *Schlesinger v. Ballard, supra,* 419 U.S., at 508, 95 S.Ct., at 577, or 'old notions,' *Stanton v. Stanton,* 421 U.S. 7, 14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975), such as 'assumptions as to dependency,' *Weinberger v. Wiesenfeld, supra,* 420 U.S. at 645, 95 S.Ct. at 1231, that

are more consistent with 'the role-typing society has long imposed,' *Stanton v. Stanton, supra,* 421 U.S. at 15, 95 S.Ct. at 1378, than with contemporary reality."

The court also found the provision in violation of equal protection for essentially the same reason, saying at 208:

> "From its inception, the social security system has been a program of social insurance. Covered employees and their employers pay taxes into a fund administered distinct from the general federal revenues to purchase protection against the economic consequences of old age, disability and death. But under sec. 402(f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of sec. 402(f)(1)(D) the insurance protection received by the males was broader than hers."

But in Weinberger v. Salfi, 422 U.S. 749 (1975), the court upheld the denial of social security benefits to a woman applying for mother and daughter benefits on the basis of a provision in the act defining "widow" and "child" excluded surviving wives and stepchildren who had their respective relationship with the deceased wage earner for less than nine months prior to his death. Quoting from the earlier case of Dandridge v. Williams, 397 U.S. 471 (1970), the court said at 769:

> " 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural

> Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. . . .' "

Other cases where the United States Supreme Court has invalidated statutes of various states on "invidious discrimination" grounds are: Craig v. Boren, 429 U.S. 190 (1976), the Oklahoma law allowed females to buy beer at age 18 but denied males age 18-20 the same right; Reed v. Reed, 404 U.S. 71 (1971); Idaho statute which gave preference to males as administrators of decedents' estates; Stanton v. Stanton, 421 U.S. 7 (1975), Utah law that made age of majority for females 18 but 21 for males.

In Frontiero v. Richardson, *supra,* a federal statute which allowed a serviceman to obtain an allowance for dependent housing if married, but did not allow a servicewoman to obtain dependency allowance for housing unless her husband was dependent upon her for more than one-half of his support, was held unconstitutional. It is noted that under the statute struck down in *Frontiero* the servicewoman was foreclosed from obtaining any benefits even though she may have supported the husband 49%; whereas, under the workmen's compensation provision in the instant case, a husband will receive benefits in accordance with the actual degree of support afforded him by his working spouse.

Three state courts have recently applied these principles to invalidate proof-of-dependency requirements imposed on widowers under their workmen's compensation statutes. Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849 (Bank 1977); Passante v. Walden Printing Co., 53 App. Div.2d 8, 385 N.Y.S.2d 178 (1976); Tomarchio v. Township of Green-

wich, 75 N.J. 62, 379 A.2d 848 (1977). In Arp, *supra,* the California Supreme Court found the conclusive presumption of dependency of widows to be violative of equal protection. The court held that the statute favors the male wage earner over the female wage-earner because of the disparity of protection accorded to their respective spouses. In *Passante* the court noted that death benefits are derived from the employment relationship itself, but a married woman has less security than a married man because of the conclusive presumption of dependency accorded to the widow but not the widower. Similarly, in *Tomarchio,* the New Jersey Supreme Court invalidated the dependency requirement of widowers as the court held the conclusive presumption accorded to widows denied women equal protection.

In summary, several jurisdictions have found statutory schemes similar to ours unconstitutional as perpetuating an outmoded standard which by its nature discriminates against those (women) whom it purports to protect.

The New York Supreme Court, Appellate Division, in *Passante* and the Supreme Court of California in *Arp* adopted a "strict scrutiny" standard of review for gender-based statutory schemes. As noted supra, in *Frontiero* the United States Supreme Court held a "dependency" provision invalid; however, only four justices adopted the "strict scrutiny" standard. Subsequent cases of the United States Supreme Court reinforces the concept that the "strict scrutiny" standard is inappropriate in these cases. See Craig v. Boren, *supra.* We decline to follow the approach utilized by New York and California, believing the "substantial relationship" test is more appropriate.

The social security cases of Califano v. Goldfarb, *supra,* and Weinberger v. Wisenfeld, *supra,* are also distinguishable. Although the issues dealt with dependency benefits, the social security scheme is generally based upon mandatory contributions from past wage earnings of the employee. The legislative history of the social security act makes it clear that survivorship benefits are in the form of "social insurance". Weinberger v. Wisenfeld, 420 U.S. at 644.

The purpose of the workmen's compensation act was not to provide for blanket "social insurance". It is substitutional to the common law creating rights and remedies in favor of the injured employee or dependents for accidents in the course of employment. See Todd v. Goosetree, 493 S.W. 2d 44 (Mo. App. 1973). The employer is the sole contributor to the fund, as opposed to the social security scheme of madnatory employee contributions (taxes) based on an income scale. See sec. 287.-290, RSMo 1969. Therefore, the United States Supreme Court cases of Weinberger v. Wisenfeld, *supra,* and Califano v. Goldfarb, *supra,* are not controlling in the case at bar.

Of some interest is the differing results reached in New York and New Jersey vis-a-vis California. In New York and New Jersey the court applied the "conclusive presumption" to widowers and thus *extended* benefits not provided for in the legislation. In California the court refused to extend benefits to widowers by using the "conclusive presumption" but rather denied that presumption to widows, thus withholding from widows the benefits of the legislation by requiring both widows and widowers to recover benefits only in proportion to proven dependency.

It appears from the opinions of the United States Supreme Court and the state courts in cases dealing with the same or similar matters, the courts have invalidated statutes by accusing Congress or state legislatures of "invidious discrimination" or of enacting statutes based upon "archaic and overbroad generalizations" which have "little relationship to present reality" or of casting female wage earners in a light which denigrates their economic contributions to their families' support. In

most instances the opinions do not rely upon evidence or empirical data to arrive at these self-serving conclusions.

On the other hand, the opinions which uphold statutes which, on their face, evidence different treatment and "discrimination" in favor of women utilize statistical data and speak of the legislation as serving the purpose of correcting past abusive discriminatory attitudes toward women.

On its face, sec. 287.240(4)(a) appears to *favor* a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's compensable death without further proof of dependency. At the time the law was first adopted we can be reasonably certain equal protection contentions were not as prevalent as today, yet it seems apparent that the purpose of the presumption was to favor widows, not to disfavor them. The data available to the general assembly at that time no doubt supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. It seems reasonably certain that during the 1920's and 1930's it was more difficult than now for a woman to obtain employment with substantial pay and very difficult for her when, upon her husband's death, she was suddenly thrust into the job market. It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

None of the cases cited by the parties in briefs, or by the court in this opinion, holds that there was no important governmental objective to be served by the conclusive presumption provisions when they were enacted. The governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. This hardship was seen

by the legislatures as more immediate and pronounced on women than on men. The statistics cited by the United States Supreme Court in Kahn v. Shevin, *supra*, appear to bear this out even today, and the claimant here has not shown any evidence or presented any empirical data to the contrary.

We do not believe the cases of *Arp*, *Passante*, and *Tomarchio*, *supra*, articulate a sound basis for declaring the statute in this case violates the equal protection clause of etiher the Missouri or United States constitutions and therefore we decline to follow them. In so doing, we recognize the legislature must strike a delicate economic balance in deciding the amounts of compensation it will require employers to pay upon injury to or death of employees.

The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to the same upon proof of dependency. In our opinion, the substantive difference in the economic standing of working men and women justifies the advantage that sec. 287.240(4)(a) administratively gives to a widow.

The judgment of the circuit court is reversed and the cause is remanded to the circuit court with directions to enter judgment affirming the decision of the Industrial Commission.

JOHN E. BARDGETT
Judge

Morgan, C.J., Rendlen, J., Finch, Sr.J., and Houser, Sr.J., concur; Donnelly, J., concurs in result in separate opinion filed; Seiler, J., dissents in separate dissenting opinion filed; Simeone and Welliver, JJ., not participating because not members of the court when cause was submitted.

Supreme Court of Missouri en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company,
and
Dicus Prescription Drug, Inc.,
Appellants.
No. 60442

OPINION CONCURRING IN RESULT

(Filed June 27, 1979)

Judges of state courts are bound to follow the "supreme Law of the Land" (Art. VI, Constitution of the United States). The "supreme Law of the Land" is *only* what the Supreme Court of the United States says it is. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *North Carolina v. Butler*, — U.S. — (No. 78-354, April 24, 1979).

The issue on this appeal is, in part, whether § 287.240, RSMo Supp. 1976, offends the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The essential problem, as I see it, is that no identifiable "supreme Law of the Land" exists by which we may adjudicate a claim of alleged gender-based discrimination. Cf. *Muller v. Oregon*, 208 U.S. 412 (1908); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977).

In this circumstance, I would turn to the issue whether § 287.240, RSMo Supp. 1976, offends Art. I, § 2 of the Missouri Constitution.

In *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1961), Mr. Justice Harlan, in dissent, speaking of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, expressed the view that "it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." He then declared that "the liberty guaranteed by the Due Process Clause * * * is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints * * *, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. * * *."

In Missouri, "all political power is derived from the people" (Mo. Const. Art. I, § 1), and the power granted by the Constitution "is intended to promote the general welfare of the people" (Mo. Const. Art. I, § 2); but "all persons * * * are entitled to equal rights and opportunity under the law" (Mo. Const. Art. I, § 2). These provisions represent a balance which Missouri has struck between "the demands of organized society" and the entitlement of individuals to "equal rights and opportunity under the law." In simplistic terms, it is the primary function of the legislative department to address "the demands of organized society," and the primary function of the judicial department to assure individuals "equal rights and opportunity under the law * * *." Mr. Justice Harlan's view would involve "particularly careful scrutiny of the state needs asserted to justify" a denial of "equal rights and opportunity

under the law. * * *." Mr. Justice Harlan's approach is not permissible in Missouri. The judicial department may not exercise any power properly belonging to the legislative department. (Mo. Const. Art. II, § 1).

The determination of a question whether "the demands of organized society," as reflected by a particular statute, are sufficient to justify an abridgment of a right reserved to the people is an appropriate exercise of a governmental function by the legislative department and is entitled to considerable deference.

The determination of the *extent* to which a right reserved to the people may be abridged by a statute, if at all, is an exercise of the judicial function, and should be conclusive on the question of the constitutionality of that statute. The judicial department is the ultimate protector of the rights of individuals.

The problem of determining the extent to which a right reserved to the people may be abridged by a statute, if at all, is a difficult one. The "demands of organized society" are probably not *relevant* to the judicial inquiry. The protection of individual rights from abridgments by statute does not lend itself easily to the construction and application of a formula. Hopefully, the Bench and Bar will address the problem. Historically, in Missouri, gender-based discriminations are held to be matters for legislative determination that cannot be considered by the courts. *Brawner v. Brawner*, 327 S.W.2d 808, 815 (Mo. banc 1959). In my view, the law should be changed so that, *as a minimum*, if a statute, which purports to satisfy the demands of organized society, *invidiously* discriminates between male and female persons, those demands and perceived needs should yield and the statute should be declared unconstitutional. *King v. Swenson*, 423 S.W.2d 699, 705 (Mo. banc 1968); Cf. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

It is worth noting that "exclusive appellate jurisdiction in all cases involving the validity of * * * a statute or provision of the

Constitution of this State" is in this Court (Mo. Const. Art. V, § 3). Until a formula evolves, the people of Missouri have a right to expect that the judges of this Court would not "draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function." *Rochin v. California*, 342 U.S. 165, 170 (1952); see Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

In final analysis, "[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe v. Ullman, supra*, 367 U.S. at 544 (Harlan, J., dissenting).

I concur only in the result.

ROBERT T. DONNELLY, Judge

Supreme Court of Missouri
en banc

Paul J. Wengler,
Respondent,
vs.
Druggists Mutual Insurance Company,
and
Dicus Prescription Drugs, Inc.,
Appellants.
No. 60442

DISSENTING OPINION

(Filed June 27, 1979)

I respectfully dissent. I would hold the statute unconstitutional as violative of the equal protection clause of both the Missouri and federal constitutions and would require death benefits be awarded surviving husbands on the same basis as they are presently awarded widows. I think the matter is well put in Passante v. Walden Printing Co., 53 A.D. 2d 8, 385 N.Y. Supp. 2d 178, 180-81 (1976), as follows:

> "[I]t is clear that the staute before us discriminates against the married woman whose employment contributes to the economic well-being of her family; whereas the working man, as a benefit of employment, is given the security of knowing that in the event of his work-related death, his widow, and therefore in most cases his family, will not suffer the loss of his entire income, the working woman is given no such guarantee . . .
>
> ". . . The disadvantage is most apparent in the present case, where Mr. and Mrs. Passante each earned approximately $200 per week. Had Mr. Passante died in a compensable circumstance, his family, through his widow, would have received, in addition to benefits payable on behalf of minor children, at least $156 per month . . . But because Mrs. Passante was the unfortunate victim, the family's resources will be less by the aforementioned amount, simply because the statute arbitrarily classifies the husband as breadwinner and consequently categorizes the wife's work as unimportant."

The point is made in Arp v. Workers' Compensation Appeals Board, 138 Cal. Rptr. 293, 563 P. 2d 849, 855 (1977) in these words: ". . . On balance, the employed woman is short-changed. While her male colleagues are assured that in the event of a fatal industrial accident their widows—even fully self-supporting widows—will receive a financial cushion, the employed woman can provide her husband with no such security. He will receive benefits only [to] the extent that he can prove dependency, and if he is himself employed he may be eligible for no supplemental death benefit whatever."

The majority distinguishes Frontiero v. Richardson, 411 U.S. 677 (1973); *Arp v. Workers' Compensation Appeals Board*, 563 P. 2d 849, and *Passante v. Walden Printing Co.*, 385 N.Y.S. 178, on the basis that they adopt a strict scrutiny standard. Instead, the majority applies a "substantial relationship" test. It then goes on to hold that since more women than men are dependent on their spouses for support, the legislature was justified in requiring widowers of working women to prove support, but not widows of working men.

There are several flaws in this argument. First, while in *Frontiero* only four members of the court concurred that sex is a suspect classification, four other members of the court concluded that the discrimination presented in that case could not pass even a more lax standard. *Frontiero*, 411 U.S. at 691-

92. Thus, in *Frontiero* eight members of the court concluded that the statutory scheme was in violation of the equal protection clause because of the discrimination against women it permitted. As the description of *Frontiero* contained in the majority opinion makes clear, the discrimination present in that case and this one are remarkably similar. There, as here, the wife was entitled to benefits automatically while the husband would be entitled only upon proof of dependency.

Weinberger v. Wisenfeld, 420 U.S. 636 (1975) and Califano v. Goldfarb, 430 U.S. 199 (1977), are distinguished on the basis that they dealt with the social security act and thus with a form of social insurance. However, in *Weinberger* the court stated:

> "The gender-based distinction made by § 402(g) is indistinguishable from that invalidated in Frontiero v. Richardson . . . Schlesinger v. Ballard, 419 U.S. 498 (1975) explained: 'In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.' *Id.*, at 507. A virtually identical 'archaic and overbroad' generalization, *id.*, at 508, 'not . . . tolerated under the Constitution' underlies the distinction drawn by § 402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." 420 U.S. at 642-43.

The majority states at the conclusion of its opinion:

> "It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy

> a *perceived need widows generally had, which need was not common to men whose wives might be killed while working.* . . .
>
> . . . .
>
> "The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to the same *upon proof of dependency*. In our opinion, the *substantive difference in the economic standing* of working men and women justifies the advantage that sec. 287.240 (4)(a) administratively gives to a widow." (emphasis added).

The quoted portions of *Weinberger* make clear that the Supreme Court has rejected just such reasoning as that advanced by the majority in support of the result reached. Regardless whether the standard to be applied is one of strict scrutiny or substantial relationship, administrative convenience and overbroad characterizations of the male as the primary breadwinner cannot serve to counterbalance or justify "a gender-based distinction which diminishes the protection afforded to women who do work." *Weinberger* at 648.

. . . . . .

Robert E. Seiler, Judge

APPENDIX B

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri 65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

July 17, 1979

Mr. John W. Reid, II
148 East Main
Fredericktown, Missouri 63645

In Re: Paul J. Wengler v. Druggists Mutual Insurance Company
Dicus Prescription Drugs, Inc.—No. 60,442

Dear Mr. Reid:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,
/s/ THOMAS SIMON
Clerk

cc: Ralph C. Kleinschmidt & Gerre Langton

APPENDIX C

In the Supreme Court of Missouri

Paul J. Wengler,
Plaintiff-Appellant,
vs.
Druggists Mutual Insurance Company, (Insurer) and Dicus Prescription Drugs, Inc., (Employer),
Defendants-Appellants.
No. 60,442.

In the Circuit Court of Missouri
Twenty-Fourth Judicial Circuit—Division I
Honorable Stanley J. Murphy, Judge

Paul J. Wengler,
Plaintiff-Dependent,
vs.
Druggists Mutual Insurance Company, (Insurer) and Dicus Prescription Drugs, Inc., (Employer),
Defendants.
No. 4543.

Transcript on Appeal

Mr. John W. Reid, II
Schnapp, Graham & Reid
148 East Main Street
Fredericktown, Missouri 63645
Attorneys for Plaintiff-Appellant

Mr. Clinton B. Roberts
Roberts & Roberts
8 South Jefferson
Farmington, Missouri 63640
Attorneys for Defendants-Appellants

William C. Morris
Official Reporter, Division I
Circuit Court of Missouri, 24th Judicial Circuit

Therefore, on October 17, 1977, a Judgment was filed by the Honorable Stanley J. Murphy as follows:

JUDGMENT

This matter comes before this Court on appeal by the Plaintiff-Dependent, Paul J. Wengler, from the Industrial Commission of the State of Missouri pursuant to 1969 Missouri Revised Statute 287.490. This was initially tried before Judge Edwin Ragland, Division of Workmen's Compensation and the parties stipulated to the facts. Plaintiff-Dependent was represented by John W. Reid, II, of Schnapp, Graham & Reid, Attorneys at Law, 148 East Main Street, Fredericktown, Missouri, and the Insurer, Druggists, Mutual Insurance Company and the Employer, Dicus Prescription Drugs, Inc., was represented by Clinton B. Roberts, of Roberts & Roberts, Attorneys at Law, 8 South Jefferson, Farmington, Missouri.

The matter was submitted to the Court based upon the transcript and stipulations and findings of the Referee and the Industrial Commission on October 6, 1977. The Court having reviewed the stipulations, the transcripts, and the briefs filed by the parties, find that the deceased employee, Ruth Mae Wengler, was crossing Employer, Dicus Prescription Drugs, Inc's parking lot on her way home from work when she was struck by an automobile operated by Denver Brixey at approximately 5:15 p.m. on February 11, 1977, and she died shortly thereafter. Mrs. Wengler earned and was paid by her Employer, Dicus Prescription Drugs Inc., at the time of her death, $69.00 per week, and in addition the Employer provided the employee, Ruth Mae Wengler, with medical coverage with Blue Cross in the sum of $88.85 per month. The Plaintiff-Dependent at the time of Ruth Mae Wengler's death was married to her and survives her and said Plaintiff-Dependent was not and is not dependent for his support either totally or partially on the earnings during

Ruth Mae Wengler's lifetime, and was not and is not physically or mentally incapacitated from wage earnings, and there are no minor children surviving Ruth Mae Wengler.

The parties further stipulated that Denver Drixey's insurance carrier, American Family Insurance Company has paid $10,000 to Paul J. Wengler under a liability policy and said payment was made pursuant to 1969 Missouri Revised Statute 287.150. Plaintiff-Dependent, Paul J. Wengler, is to receive credit in the amount of $500.00 as a necessary and reasonable attorney fee in accordance with 1969 Missouri Revised Statute 287.150, and Defendants, Druggists Mutual Insurance and Dicus Prescription Drugs, Inc., are entitled to a credit of $9,500.00 under 1969 Missouri Revised Statute 287.240.

The Court further finds the parties stipulated that Defendants, Employer and Insurer, have paid burial expenses in the amount of $2,000.00 to Wilson Funeral Home, Fredericktown, Missouri, as provided for in 1969 Missouri Statute 287.240.

The Court does further find from all the evidence that Employee, Ruth Mae Wengler, sustained injuries resulting in her death by accident arising out of and in the course of her employment with Dicus Prescription Drugs, Inc. on February 11, 1977. The Court further finds that Employee, Ruth Mae Wengler, sustained an unexpected, unforeseen event that happened suddenly and violently causing injuries resulting in her death. The Court further finds that employee's accident was a natural reasonable incident of her employment and was a rational consequence of some hazard connected with her employment. The Court further finds said accident occurred within her period of employment at a place where she should have been while she was reasonably fulfilling the duties of her employment. The Court further finds that Employee's average weekly wage was $69.00 per week, and the rate of compensation under the Missouri Workmen's Compensation Law is $46.00 per week, and

further finds that the Blue Cross payments of $88.85 per month by Ruth Mae Wangler's employer was not part of Employee's weekly earnings.

The Court finds that portion of 1976 Missouri Revised Statute 287.240, Paragraph 4, which restricts a husband from Workmen's Compensation benefits unless he is mentally and physically incapacitated as violating the Equal Protection Clause of the United States Constitution and the Missouri Constituiton because a wife is entitled to Workmen's Compensation upon the death of her husband under the Missouri Workmen's Compensation Law without providing that she is mentally or physically incapacitated from wage earnings. It was the opinion of Referee Ragland and the Industrial Commission that the Commission nor the Referee had authority to declare the aforesaid restrictive clause of the death payments under Missouri Workmen's Compensation unconstitutional because an administrative branch of government does not have that authority and only a court can decide whether or not a Statute is unconstitutional. There are no Missouri cases on constitutionality of the restriction to a surviving husband under the Missouri Workmen's Compensation Law; however, there have been two recent cases which are cited by Plaintiff-Dependent from the States of California and New York which have similar Statutes as Missouri on the dependency requirements under Workmen's Compensation Law and said Courts have held said restriction to violate the equal protection clause of the Constitution. See *ARP v. Workers Compensation Appeals Board, 61 CAL.*, APT. 3rd, 29 (1976), and *Passante v. Waldren Printing Company*, 385 N.Y.S. 2nd 178 (1976).

Also, Plaintiff-Dependent has cited the U.S. Supreme Court, Califano v. Goldfarb, 97 S.Ct. 1021 (1977), which holds that a widower was entitled to survivor's benefits under the Social Security Law without showing that he was receiving at least one-half of his support from his deceased wife when she died

due to the fact that the widower was not required under the Social Security Law to show that she was dependent upon her husband at the time of his death.

Accordingly, it is the opinion of this Court that the portion of the 1976 Missouri Revised Statute 287.240 which restricts death benefits of a widower of a deceased wife's Workmen's Compensation benefits to only those surviving husbands who are mentally or physically incapacitated from wage earnings and are dependent upon the wife's wage earnings are unconstitutional because it violates the equal protection clause of the United States Constitution and the Missouri Constitution because the restriction does not apply to the surviving wife in the event of the husband's death. (See Article 14, Section 1, of the United States Constitution and Article 1, Section 2, of the Missouri Constitution.)

WHEREFORE, it is Ordered, Adjudged and Decreed that Plaintiff-Dependent, Paul J. Wengler, recover from Druggists Mutual Insurance Company and Discus Prescription Drugs, Inc., Workmen's Compensation Death Benefits at the rate of $46.00 per week in accordance with the Missouri Workmen's Compensation Law and that the Defendants, Insurer and Employer, be given a credit of $9,500.00 in accordance with 1969 Missouri Revised Statute 287.150 for the settlement with Denver Brixey's insurance carrier for the wrongful death of Ruth Mae Wengler. The costs of these proceedings are taxed against Defendants, Druggists Mutual Insurance Company, Insurer, and Dicus Prescription Drugs, Inc., Employer.

Dated this 13th day of October, 1977.

APPENDIX D

In the Supreme Court of the State of Missouri

Paul J. Wengler, Appellant, vs. Druggists Mutual Insurance Company and Dicus Prescription Drugs, Inc., Appellees.	Missouri Supreme Court Case No. 60442

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul J. Wengler, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Missouri Supreme Court overruling appellant's Motion for a Rehearing entered in this suit on July 17, 1979.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2).

Respectfully submitted,

/s/ JOHN W. REID, II
SCHNAPP, GRAHAM & REID
148 East Main Street
Fredericktown, Missouri 63645
314-783-7212
Attorneys for Appellant

I, John W. Reid, II, attorney for Appellant, do hereby certify that I did on the 18th day of July, 1979, by United States Postal Service, with the proper postage affixed, mail a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to Mr. Ralph C. Kleinschmidt, Evans & Dixon, 314 North Broadway, St. Louis, Missouri 63102, attorney for Appellees; to Mr. Thomas F. Simon, Clerk of the Missouri Supreme Court, P. O. Box 150, Jefferson City, Missouri 65101; and to Mr. Michael Rodak, Jr., Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543.

/s/ John W. Reid, II

Subscribed and sworn to before me this 18th day of July, 1979.

/s/ Norma J. Counts
(Seal) Notary Public

My Commission Expires: April 21, 1980.

APPENDIX E

LABOR AND INDUSTRIAL RELATIONS **287.240**

287.240. Death payments—burial expenses, amount, to whom and when paid—dependent defined—death benefits, how distributed—record of dependents, employer to keep

If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding two thousand dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employee unless he has furnished the same by authority of the widow or widower, the nearest relative of the deceased employee in the county of his death, his personal representative, or the employer, who shall have the right to give the authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the division or the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The division or the commission shall also have jurisdiction to hear and determine all disputes as to the charges. If the deceased employee leaves no dependents the death benefits in this subdivision provided shall be the limit of the liability of the employer under this chapter on account of the death, except as herein provided for burial expenses and except as provided in section 287.140; provided, that in all cases when the employer admits or does not deny liability for the burial expense, it shall be paid within thirty days after written notice, that the service has been rendered, has been delivered to the employer. The notice may be sent by

registered mail, return receipt requested, or may be made by personal delivery;

(2) The employer shall also pay to the total dependents of the employee a death benefit on the basis of sixty-six and two-thirds percent of the employee's average weekly earnings during the year immediately preceding the injury as provided in section 287.250. Compensation shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case be less than at the rate of sixteen dollars per week nor more than one hundred fifteen dollars per week or as provided in section 287.160. If there is a total dependent, no death benefit shall be payable to partial dependents or any other persons except as provided in subdivision (1);

(3) If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately;

(4) The word *"dependent"* as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two years shall be

paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be **Note 3**

divided among such other total dependents and paid to them during their period of entitlement under this chapter;

(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he is living at the time of the death of the parent. In case there is a wife or a husband mentally or physically incapacitated from wage earning, dependent upon a wife, and a child or more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on the dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefits shall be divided equally among them. The payment of death benefits to a child or other dependent as provided in this paragraph shall cease when the dependent dies, attains the age of eighteen years, or becomes physically and mentally capable of wage earning over that age, or until twenty-two years of age if the child of the deceased is in attendance and remains as a full-time student in any accredited educational institution, or if at eighteen years of age the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child shall be entitled to compensation during four years of full-time attendance at a fully accredited educational institution to commence prior to twenty-three years of age and immediately upon cessation of his active duty in the armed forces, unless there are other total dependents entitled to the death benefit under this chapter;

(5) The division or the commission may, in its discretion, order or award the share of compensation of any such child to be paid to the parent, grandparent, or other adult next of kin or legal guardian of the child for the latter's support, maintenance and education, which order or award upon notice to the parties may be modified from time to time by the commission in its discretion with respect to the person to whom shall be paid the amount of the order or award remaining unpaid at the time of the modification;

(6) The payments of compensation by the employer in accordance with the order or award of the division or the commission shall discharge the employer from all further obligations as to the compensation;

(7) All death benefits in this chapter shall be paid in installments in the same manner as provided for disability compensation;

(8) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employees, and upon the death of an employee by accident arising out of and in the course of his employment shall so far as possible immediately furnish the division with said names and addresses.
Amended by Laws 1965, p. 397, § 1; Laws 1965, p. 414, § 1; Laws 1967, p. 384, § 1; Laws 1969, p. 393, § 1; Laws 1971, p. 307, § 1; Laws 1974, p. 853, § 1; Laws 1975, p. 285, § 1; Laws 1976, p. —, S.B. No. 708, § 1; Laws 1978, p. 703, H.B. No. 1260, § 1.

Revisor's Note: The maximum weekly installment amount in subdivision (2) was increased to fifty-two dollars in the section as reenacted in Laws 1965, p. 414. Other changes were made identically in 1965 bills.

Supplementary Index to Notes

Contribution 18.5

3. Persons entitled to compensation

Where employee was killed while crossing railroad tracks on his way to work, employer did not have guards regulating pedestrian traffic along employee's route, and there were no cross-walk lines painted across road which separated railroad tracks from entrance to employer's premises, essential elements for applying extension of premises doctrine were lacking, and employee's survivors were not entitled to * * *